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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1024

CITIZENS FOR PARENTAL RIGHTS, et al.,
Appellants,

vs.

SAN MATEO COUNTY BOARD OF EDUCATION, et al.,
Appellees.

On Appeal from the Supreme Court
of the State of California

Brief in Opposition to Motion to Dismiss

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INTRODUCTION

Appellants submit this brief in opposition to appellees' Motion to Dismiss, in refutation of said motion, and to corroborate the substantiality of the issues raised on this appeal as asserted in their Jurisdictional Statement.

Said Motion to Dismiss epitomizes the cavalier and disdainful approach of the appellees to the serious and substantial constitutional issues involved in the within appeal.

The appellees' view of the problem is extremely narrow, in that they claim that the *only* question involved in this appeal is whether or not the amended complaint stated a cause of action; and subordinately, whether the family life and sex education courses sought to establish a religion, and further, whether the excusal statutes vitiated the appellants' claims concerning the Free Exercise Clause and the constitutional right to privacy. Moreover, the appellees have completely and totally ignored two very substantial and important issues, specifically, the issue which concerns the state questioning and usurping parental authority and control, and the issue of possible unequal protection of the laws arising out of the operation of the excusal statutes.

The appellees, in infantile and simplistic fashion, argue that since the amended complaint did not contain evidentiary matter, no constitutional questions are at issue. The appellants do not know of any law to substantiate such shallow conclusions.

JUSTIFICATION, WITHOUT FACTUAL INQUIRY, OF THE DISPUTED SUBJECT MATTER BY LABELING IT "EDUCATION" AND "HEALTH" IS DECEPTIVE AND MASKS ITS TRUE NATURE.

The appellees advance, as their argument, the *unsupported conclusion* of the opinion of the District Court of Appeal in *Citizens for Parental Rights, et al. v. San Mateo County Board of Education, et al.* (1975) 51 Cal.App.3d 1, 124 Cal.Rptr. 8, to the effect that any subject matter is permissible in the public schools if it can be characterized as "education" and "health". Characterization is, therefore, critical to the issues raised in this case. Consequently, it is pertinent to inquire whether or not the subject matter presented by the State in the public school classrooms of San Mateo County, can be characterized as "education" or

"health" instruction. While the appellants were never permitted to offer evidence on these issues, it is germane at this time to examine some of the more pertinent aspects of the so-called Family Life and Sex Education Program in order to determine whether or not the subject matter can truly be said to be permissible as "education" and "health" instruction, *without factual inquiry*. The following are actual excerpts from portions of the disputed materials:

A. The following is a portion of a "test" in a junior high school in San Mateo County (Grades 6, 7 and 8):

HOW DO YOUR PARENTS REALLY RATE?

1. I am proud of the way my parents look. ☐
2. My parents are always willing to listen to what I have to say. ☐
3. I have fun just being with my parents once in a while. ☐
4. My home usually seems like a cheerful place. ☐
5. My parents allow me to have more responsibility than they did a year ago. ☐
6. I enjoy telling my parents about school and parties and different things. ☐
7. I am not afraid to go to my parents with any questions or problems. ☐
8. I think my parents are giving me a fair allowance. ☐
9. My parents permit me to take part in important family decisions and discussions. ☐
10. My parents let me make many of my own decisions. ☐

Further along in the same "test" appears the following:

PARENT PROBLEM INVENTORY

Place a check in the box following each statement if you feel the same way about your parents or guardian.

If only my parents would:

1. Be less bossy ☐
2. Stop treating me like a little child ☐
3. Give me more privacy ☐
4. Let me go with any friends I want to ☐
5. Stop wanting me to be like somebody else ☐
6. Stop expecting so much of me ☐
7. Act as concerned about me as they do about my brother (sister) ☐
8. Be less old-fashioned ☐
9. Make less of a fuss about my school work ☐
10. Not make fun of the things I do and say ☐
11. Let me have a larger allowance ☐
12. Stop trying to know all my thoughts and feelings ☐
13. Really listen when I explain my point of view ☐
14. Keep their promises to me ☐
15. Encourage me in the things I try to do ☐
16. If I say anything to contradict my dad I get back-handed. ☐

One needs to ask the question: "What exactly is the 'educational' or 'health' purpose of the above-stated test?" The answer is "None." More likely than not, this "test" is an invasion of privacy that could tend to create dissension within the family unit.

B. Following a visit by Mr. Walter Smithey, County Coordinator of the Family Life Education Program, to a Home Economics class in one of the public schools of San Mateo County, one of the students wrote the following letter to Mr. Smithey:

Dear Mr. Smithey:

I am one of Mrs. Kreuger's homemaking students in the class at Oceana you visited Monday.

I would like to thank you for coming to discuss some of the problems that teenage girls have with their parents. Mrs. Greenly and Mrs. McCann helped a great deal by putting themselves in our parents position and answering the questions we would like to ask our parents. This I believe really helped, having the opinion of people who have raised their own children. However, we felt they were not typical of our parents.

I am speaking for the whole class when I say the discussion was enjoyed by all of us. I only wish all parents were as understanding.

Sincerely,
Linda Brockway [Italics added]

Once again, the question must be asked: "What exactly is the 'educational' or 'health' purpose of the above kind of prying, by the State, into the family lives of students in the State schools?" The answer, again, is "None." The latter seems to indicate a deep invasion of privacy, without either "education" or "health" ingredients.

C. The following are samples of subject matter for use in the public school classrooms in San Mateo County, at varying grade levels, up to Grade 12, for mixed class consumption:

1. The excerpts below are from a document entitled "Sex Knowledge Inventory," *for Grades 9 to 12,* mixed classes

(males and females), in which document the student is directed to "Be sure to read carefully all directions. Answer EVERY question. If you do not know, GUESS."

Question 2. Sex relations are:

A. For physical pleasure.
B. A way to relieve tension.
C. A way to express love.
D. A biological urge.
E. All of the above.

Question 10. In some women sexual excitement causes a noticeable enlargement and firmness of the clitoris. Other women become sexually excited with no noticeable change in the clitoris. How do these women differ in strength of sex desire and capacity for orgasm?

A. Absence of clitoral response indicates low desire and low capacity.
B. Women with no clitoral response require direct clitoral stimulation.
C. Noticeable clitoral response is unrelated to desire or capacity.
D. An enlarged and firm clitoris indicates capacity for vaginal orgasm.
E. An enlarged clitoris must be directly stimulated for orgasm to occur.

Question 18. Of the following, which is the best position for sex relations?

A. A side position, which frees the hands for sex play.
B. The man above with the woman facing him.
C. The man above with the woman facing away from him.
D. The woman above with the man facing her.
E. Any position pleasing to both.

Once again, with respect to these intensely explicit matters relative to sex information, one must question whether

or not this material has anything legitimately to do with "education" or "health."

2. The following language is taken from a book, *for Grades 9 to 12,* for mixed classes (males and females), entitled "Living with Sex—The Student's Dilemma," by Richard F. Hettlinger, an integral part of the subject matter at issue:

> "The great majority of homosexuals obtain their satisfaction from manual petting or oral-genital contacts, which are widely accepted in the heterosexual world, and which frequently form the preliminary to coitus for a man and a woman. *There is certainly no rational ground for regarding all homosexual body contacts as any more disgusting than those of normal people."* [Italics added]

Conceivably, such instructional material could cause interference with religious beliefs, and it is doubtful that such material can be characterized as "education" or "health" related.

D. The statement below deals directly in matters of a religious nature, and thus, subject to findings of fact, could perhaps interfere with one's religious beliefs:

In a book entitled "Nature, Man and Woman," by Alan W. Watts, for Grades 9 to 12, the following appears:

> "It has, then, been my impression that there is a deep and quite extraordinary incompatibility between the atmosphere of Christianity and the atmosphere of the natural world. It has seemed well-nigh impossible to relate God the Father, Jesus Christ, the angels, and the saints to the universe in which I actually live. Looking at trees and rocks, at the sky with its clouds or stars, at the sea, or at a naked human body, I find my-

self in a world where this religion simply does not fit. Indeed, it is a characteristically Christian attitude to confirm this impression, since 'my kingdom is not of this world.' Yet if God made this world, how is it possible to feel so powerful a difference of style between the God of church and altar, for all his splendor, and the world of the open sky? No one would dream of attributing a landscape by Sesshu to Constable, or a symphony by Hindemith to Haydn. In the same way, I have found it a basic impossibility to associate the author of the Christian religion with the author of the physical universe."

This could be construed as a direct attack, under sponsorship of the State, against those holding traditional views about the universe in relation to Divine authority. As such, it may be found, upon factual inquiry, to violate the religious beliefs of those subjected to it, and it is highly questionable whether or not it has any "education" or "health" attributes.

The foregoing excerpts constitute only a very minor sampling of some of the disputed subject matter, which should be subjected to the test of constitutionality, perhaps infringing upon the personal liberties of the appellants. The Family Life and Sex Education Program is literally overflowing with similar questionable content, wherein the following areas of injuiry are pursued, with vigor by the State, in public and open discussion, in classes with males and females:

Students are required to

1. Reveal emergencies that have arisen in their families;
2. Discuss their relationships with their parents;
3. Explain how they act with their parents;

4. Reveal times when they were proud of their parents;
5. Discuss conflicts between them and their parents;
6. Write about their families' experiences;
7. Write compositions criticizing adults;
8. Discuss whether or not children should be disciplined;
9. Discuss their standards of sexual conduct;
10. Explain changes that occur during sexual stimulation;
11. Discuss whether or not extramarital sex relations are meaningful.

Students are encouraged to

1. Discuss the need for training classes for parents in parent effectiveness;
2. Discuss how, if they were parents, they would be different from their own parents;
3. Debate the topic "I have a right to do as I please."

In these broad areas of so-called "education" and "health," dealing with private and personal matters, it is important to note that these are subjects for open discussion in classes with males and females, *potentially for peer and teacher approval, thus prospectively involving State coercion and indirect pressure.*

A rational examination of the above excerpts from the actual material being promoted and presented by the State in the public school classrooms in San Mateo County, certainly should cause the reader to question its purported "education" and "health" characteristics. In any event, the material should be subjected to judicial scrutiny. The

judgment of dismissal below has placed the judicial seal of approval on these highly suspect State sponsored incursions into the appellants' personal lives, but without the safeguards of such judicial scrutiny, and under a mantle of blindness and ignorance of the true facts. Grave constitutional issues should not be given such short shrift.

STATUTORY EXCUSAL PRIVILEGES DO NOT OVERCOME THE CONSTITUTIONAL ISSUES.

The overriding questions, as presented in the Jurisdictional Statement previously filed by the appellants, concern whether or not the State, through its public school system, has the unlimited, unencumbered, unfettered, unimpeded and unhampered privilege and right to promote, engage in and advance a broad program of instruction in family life and sex education, merely because of the existence of statutes permitting limited excusal. Even assuming that the excusal system and procedure is constitutional, *those individuals not availing themselves of the excusal privileges are left with completely uncontrolled and unmanageable intervention by the State into their personal and private lives.*

This is admitted by the appellees, as shown below. On December 15, 1972, the appellants took the deposition of Walter Oliver Smithey, Coordinator of the Family Life Education Program in San Mateo County. The following are excerpts from that deposition:

> Q. I am going to ask you to look at Exhibit "A" which was attached to the original complaint which consists of material that I am holding. And before you look at it, I want to tell you what we have said about that material. We have said that the material in Exhibit "A" questions parental authority by, and I would use the precise language in the complaint, "encouraging analysis, appraisal and criticism of parental authority." I would like you to scan that material and see whether or not you agree or disagree with that contention . . .
>
> Q. Do you think it could, in some instances, actually question the authority of parents?
>
> A. I suppose if it were misused, it could.
>
> Q. *All right. Is there any way for the county to actually prevent its misuse?*
>
> A. *No.*
>
> Q. Let me ask you now to look at Exhibit "B", which again consists of a number of pages, and while you are doing that, bear in mind that we have contended the following: "That the material invades the privacy of the home by encouraging and permitting pupils to reveal personal family matters to teachers and to other children" . . .
>
> A. . . . it's a question of do we want to keep a relationship between home and family and the school open. We don't want to close that off.
>
> Q. Then, if I understand you, the inference of your response, *you agree that it does encourage the relationship of these personal matters, family matters, but that you think that it is all right. Is that a fair conclusion?*
>
> A. *Yes.*
>
> • • • • • • •
>
> Q. But you still agree that there is a line beyond which this can be in bad taste.
>
> A. Oh certainly.
>
> Q. And you do not know where that line is I take it? You cannot define it can you?
>
> A. . . . We can't define that on the adult level.
>
> Q. That is what kind of bothers me. How do you control the kind of inquiry which is engaged in here if you can't define it? How can you control it?
>
> A. I think this becomes the judgment of the teacher.
>
> • • • • • • •

On the same day, December 15, 1972, the County Superintendent of Schools for the County of San Mateo, J. Russell Kent, was also deposed. Excerpts from his deposition follow:

> Q. I want to just get it clear in my own mind if upon reexamining Exhibit "A", for example, that you still deny that that type of material would question parental authority?
>
> A. I would say that it could, depending. But it need not be. It depends how it is used . . . And again, I emphasize that it depends very much upon the age of the children, what was presented, the instruction, the whole context in which this instruction takes place . . . *Now, I certainly see how the things that are cited there could be carried to an extent where it could become an invasion of privacy . . .*
>
> • • • • • • •
>
> Q. Well then, would you concede that the handling of this kind of material is an extremely sensitive and difficult problem for a teacher?
>
> A. *Yes. I will concede that this requires, the sensitive material, it does require judgment.*
>
> • • • • • • •
>
> Q. *All right. My question is, how do you limit the teacher or how do you control the teacher so that these infringements do not occur? Is there any way to do it?*
>
> A. . . . *This is the problem of the management of schools . . . Certainly all areas are not equally sensitive and this I agree to. And I have agreed that the area of Family Life Education is more sensitive than some other areas. So that the problem almost does become more pointed in this area than it does in an area which is void of social or moral values, such as the area of mathematics.*
>
> • • • • • • •
>
> Q. With respect to the withdrawal system, the plaintiffs have alleged that the very fact that there is withdrawal is discriminatory and causes an inequality between students. The defendants have denied that it does this. Does this state your position, essentially, that it does not make any difference between the students?
>
> A. No. I would not take that position. *I think where children separate themselves that this does have repercussions . . .*

From the above excerpted testimony of the Coordinator of the Family Life Education Program in San Mateo County and the Superintendent of that County's schools, nothing could be clearer than the fact that *none of the subject matter which is disputed in this case can be delivered in the classroom with any assurance that the students and their parents will be free from intrusions into their personal lives by the State.* The obvious impact of such uncontrolled inquiry, under State induced coercion and pressured atmosphere present in public school classrooms, if left unrestrained, is tantamount to opening the flood gates of intervention into, and interference with, personal liberties guaranteed by the United States Constitution. *Even with the excusal statutes in effect, those not able to discern whether or not withdrawal is advisable are subjected to ever broadening and increasing penetration into their personal lives.* Such broad incursions by the State are inherently repulsive to the Bill of Rights of the United States Constitution and have no bona fide "educational" or "health" reason for existing.

THE QUESTIONS ARE SUBSTANTIAL AND TAKING JURISDICTION WILL NOT INVOLVE THIS COURT IN ADMINISTERING THE PUBLIC SCHOOL SYSTEM.

It is clear from the foregoing references that the areas of subject matter involved in this appeal deal with highly per-

sonal and private matters relative to family life, sexual behavior and attitudes, privacy and religious beliefs. *Appellants are not aware of any authority for the proposition that the State, through its public school system, has any power or authority to become intimately involved with the innermost, personal and private lives of students attending public schools, nor have the appellees cited any such authority.*

The questions presented on this appeal are critical and substantial, in that they involve the right of parents to raise their children without interference by the State in personal, private and intimate matters relating to family life, moral values, religious beliefs and personal behavior. They also involve the right of parents to raise their children without the State questioning and usurping their parental authority and control. Further, they also involve the right of parents and their children to have privacy in matters relating to their homes and in matters relating to their thoughts. And finally, they involve the right to be free from the State's interference in their religious beliefs and practices. The questions involved in this appeal are also critical and substantial because parents and school age children, need to know whether the State's right to give instruction, through the public schools, in the intimate and personal aspects of life is absolute, or whether it is limited or prohibited by the United States Constitution. *If the matter is left unresolved by way of summary dismissal, the result will be the total freedom of the State to encroach upon and interfere with the appellants' religious liberties and their right to privacy, and their right to raise and control their own children in matters of personal, intimate and fundamental nature.*

Neither "education" nor "health" are at issue; instead, personal and fundamental freedoms are at issue and in con-

flict with the State in this appeal. In *Wisconsin v. Yoder* (1972), 406 U.S. at page 214, this Court made the following statement:

> "Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children . . ."

In the case here on this appeal, the "balancing" test which is mandated by the quoted language has not been applied. Instead, it has been summarily discarded by the courts below.

The appellants are mindful of the fact that this Court has traditionally exercised extra care and restraint in dealing with the public school system relative to regulation and control of subject matter. *However, there has been no hesitancy to intervene where personal liberties and constitutional freedoms are in issue,* as in this case. As stated in *Epperson v. Arkansas* (1968), 393 U.S. 97, this Court made the following declaration:

> "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. *Our courts, however, have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief.* By and large, public education in our Nation is committed to the control of State and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values. *On the other hand,*

> '[t]*he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools,' Shelton v .Tucker,* 364 U.S. 479, 487, 5 L.Ed.2d 231, 236, 81 Sup.Ct. 247, (1960)." [Emphasis added]

This Court need not be fearful that taking jurisdiction in this appeal will unduly involve the Court in the administration and operation of the Nation's public schools. *The appellants seek only to obtain a determination concerning three specific and narrow areas relative to the appellants' personal liberties: (1) usurpation of their parental authority and control; (2) the right of privacy in their homes and in their thoughts; (3) the right to be free from the State's interference with their religious beliefs.*

These three primary areas are limited in nature and scope, and do not affect the State's *legitimate* interest in education in all other fields of academia, e.g., English, History, Mathematics, Physics, Chemistry, Biology, Earth Science, Science, Physical Education, Reading, Literature, Composition, Vocational Instruction, Commercial Courses, Geography, Social Studies, Language Arts, Foreign Languages, and Performing Arts, to mention but a few. *To put it in another way, no harm could conceivably come to the State's educational purposes by the possible exclusion of the contested subject matter.*

CONCLUSION

The importance and substantiality of the questions presented on this appeal cannot be emphasized too much. Where it can be shown that the State is involved in an active campaign which includes invasions of personal rights guaranteed by the United States Constitution, the questions raised cannot be viewed as insignificant, unimportant or unsubstantial.

Therefore, the appellants respectfully urge this Court to note jurisdiction, and to order briefs on the merits so that this critical case can be heard.

Dated: March 24, 1976

Respectfully submitted,

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